No. 90-1296

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

REMINGTON ARMS COMPANY, INC. - - Petitioner

versus

NICHOLAS N. KING - - - - - - - Respondent

On Petition For Writ Of Certiorari To The
Court Of Appeals Of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petition for writ of certiorari presents the following questions:

1. Whether Kentucky law, as applied below, violates constitutional guarantees of due process by giving the jury standardless discretion in determining the amount of punitive damages?

2. Whether Kentucky law, as applied below, violates constitutional guarantees of due process by permitting an award of punitive damages in the absence of, at a minimum, clear and convincing evidence of the defendant's gross negligence?

3. Whether the amount of punitive damages awarded by the jury violated the defendant's due process right to be free of grossly excessive, disproportionate damages awards?

RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioner, Remington Arms Company, Inc. states that it is a Delaware corporation and is a wholly owned subsidiary of E.I. du Pont de Nemours & Co., a Delaware corporation.

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October Term, 1990

REMINGTON ARMS COMPANY, INC. - - - *Petitioner*

v.

NICHOLAS N. KING - - - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

Remington Arms Company, Inc. ("Remington") respectfully petitions this Court for a writ of certiorari to review the decision of the Court of Appeals for the Commonwealth of Kentucky in this case

OPINIONS BELOW

The opinion of the Court of Appeals for the Commonwealth of Kentucky [App. A hereto] and its order denying Remington's petition for rehearing [App. B hereto] are unreported. The order of the Kentucky Supreme Court denying Remington's motion for discretionary review [App. C hereto] also is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). The opinion of the Court of Appeals for the Commonwealth of Kentucky was entered on March 30,

1990. The Court of Appeals denied Remington's petition for rehearing on June 15, 1990. Remington's timely motion for discretionary review was denied by the Supreme Court of Kentucky on November 20, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 13, 1982, Respondent, Nicholas King ("King"), an attorney and skeet shooting enthusiast, was injured in a shooting accident while using a Remington Model 1100 12-gauge shotgun. King sustained severe injuries to his left hand, wrist and forearm when the gun barrel exploded. At the time of the accident, King was using "reloaded" or homemade shotgun shells.[1]

King filed this action in 1983 against Remington and others in the Jefferson Circuit Court in Louisville, Ken-

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[1]Skeet shooters frequently make their own reloads as an economy measure. King made his reloaded shell using a Ponsness/Warren reloading machine purchased a short time before the accident. The reloading machine is a circular device which performs eight different successive functions. To use the reloader, the operator begins with an empty shell and, using hand levers, guides the shell through the machine's eight functions, including the insertion of a detonator cap, gunpowder, shot and a wad.

tucky.[2] The complaint sought compensatory damages under a products liability theory. The claim for punitive damages was added by amendment. King settled with or dismissed the other defendants and proceeded to trial against Remington only.

The case was tried in December, 1988. On the punitive damage issue, Remington tendered instructions based upon Ky.Rev.Stat. §411.184 to .186, Kentucky's new punitive damage statutes which became effective after King's accident but before the trial.[3] Ky.Rev.Stat. §411.184 provides that a plaintiff can recover punitive damages only upon proving by clear and convincing evidence that the defendant acted with oppression, fraud or malice, and defines those terms. Ky.Rev.Stat. §411.186 declares that punitive damage claims shall be tried with all other issues and provides five factors to guide the jury in deciding the amount of the award.[4]

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[2]These other defendants included the manufacturers of the gunpowder (du Pont Company) and shells (Winchester Group, Olin Corporation) used in making the reloads and the maker of the reloading machine (Ponsness/Warren, Inc.).

[3]Remington unsuccessfully argued in state court that the statutes should have been applied retroactively under Kentucky law. Remington does not seek this Court's determination on this purely state law issue. The relevance of these statutes is that instructions based thereon might have decreased the defects of the instructions given in this case. These statutes also demonstrate that even the Kentucky Legislature has recognized the infirmities of punitive damage awards based on standardless discretion. While Remington does not accept that the Kentucky statutes completely solve the problem, the Legislature at least has moved in the right direction.

[4]These factors include: the likelihood at the relevant time that serious harm would arise from the defendant's misconduct; the degree of the defendant's awareness of that likelihood; the profitability of the misconduct to the defendant; the duration of the misconduct and any concealment of it by the defendant; and any actions by the defendant to remedy the misconduct once it became known.

Expressing concern that it would cause an unfair "ex post facto" application of the law, the trial judge refused to instruct the jury in accordance with these statutory standards because Ky.Rev.Stat. §411.184 and .186 took effect after King's lawsuit was filed. The trial judge revealed doubt, however, that the punitive damages issue should go to the jury if the clear and convincing standard of evidence applied to the case.

Despite Remington's objections, the trial court instructed the jury as follows:

> If you find for the Plaintiff, Nicholas King, and you are further satisfied from the evidence that his injuries were caused by the gross negligence of the defendant Remington Arms Company, Incorporated, you may, in your discretion, award punitive damages against Remington in addition to the damages authorized in instruction number 1. If you award punitive damages, you'll state the amount on verdict form B.

This instruction, quite obviously, provided no guidance as to whether to punish and in what amount. On December 16, 1988, the jury returned a verdict for $417,926.47 in compensatory damages and $6 million in punitive damages.

Remington filed alternative motions for new trial or judgment notwithstanding the verdict. Among other things, Remington argued that both the instructions and the award itself violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[5] Reming-

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[5]In its January 9, 1989 motion for a judgment notwithstanding the verdict and motion and grounds for a new trial, Remington stated, in part:

> F. The Court's instructions to the jury with respect to the Plaintiff's claim for punitive damages was in violation of

(Continued on next page.)

ton's post-judgment motions were overruled without opinion.

Remington appealed to the Court of Appeals for the Commonwealth of Kentucky, asserting several state law grounds of error and again raising the constitutional infirmities of the punitive damage award. The Kentucky Court of Appeals upheld the award against Remington on March 30, 1990 [App. A hereto], stating that "the issue was not raised in the trial court and we cannot *sua sponte* address issues which were never raised, no matter how challenging" [*Id.* at 3]. Remington's petition for rehearing, which pointed out that the issue *had* been raised in post-trial motions and by the tender of instructions which would have cured the defect, also was overruled without opinion by the Court of Appeals [App. B hereto].

Remington filed a timely petition for discretionary review to the Kentucky Supreme Court. This petition again set forth the constitutional inadequacies of the punitive damage award and sought reversal on those, and state law, grounds. The Kentucky Supreme Court denied this petition without opinion on November 20, 1990 [App. C hereto]. Thereafter, the Kentucky Supreme Court overruled Remington's motion to stay the judgment pending the filing of this petition [App. D hereto].

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. . . the Due Process Clause and the Equal Protection Clause of the 14th Amendment to the United States Constitution and Section 2 of the Kentucky Constitution.

G. The amount of punitive damages awarded the plaintiff by the jury is unconstitutionally excessive under the United States Constitution in that it violates . . . the Due Process Clause and the Equal Protection Clause of the 14th Amendment of the United States Constitution and Section 2 of the Kentucky Constitution.

REASONS FOR GRANTING THIS PETITION

The $6 million awarded in this case is the largest punitive damage award in Kentucky history, but this is not an isolated case. As Justice O'Connor noted in *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 2924 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part), such awards are "skyrocketing." They are, in the words of one commentator, "out of control." J. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va.L.Rev. 139 (1986).

While this Court has never specifically set forth what the Due Process Clause requires for an imposition of these civil fines, it has banned punitive damages in a broad category of defamation cases, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), and in unfair representation suits brought against unions, *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 52 (1979). The serious constiutional issues raised by punitive damage awards have been noted in several recent opinions of this Court. *Browning-Ferris*, 492 U.S. 257, ____, 109 S.Ct. 2909, 2923 (Brennan, J., joined by Marshall, J. concurring; O'Connor, J., joined by Stewart, J., concurring and dissenting in part); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988) (O'Connor, J., joined by Scalia, J., concurring); *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986).

Like *Pacific Mutual Life Ins. Co.* v. *Haslip, cert. granted*, 110 S.Ct. 1780 (1990), currently pending before this Court, this case involves the question whether the lack of *any* standards in determining the amount of an award violates the Due Process Clause's prohibition against selective and arbitrary punishment. As importantly, this case provides

an excellent illustration of the significance of a heightened burden of proof in imposing punishment in this manner and gives this Court an opportunity to examine and define the level of proof required by the Due Process Clause for imposing these civil punishments. Remington submits that, at the very least, a clear and convincing standard of proof is constitutionally required.

I. Kentucky Law, as Here Applied, Violates Due Process by Allowing the Jury to Award Punitive Damages in Its Standardless and Arbitrary Discretion.

The jury instruction given in this case provided virtually no guidance at all. The jury was instructed simply to award punitive damages if it found gross negligence and that these damages were to punish the defendant and to deter such conduct in the future. Thus, the jury was invited to apply its unbridled discretion to the decision whether to punish and in what amount.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that a state may not "deprive any person of life, liberty, or property without due process of law." The section mandates that all proceedings adjudicating a person's right to life, liberty or property be "fundamentally fair." *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 25 (1981). The touchstone of the fundamental fairness requirement is the protection of litigants from the arbitrary imposition of punishment or deprivation. *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986).

It is a fundamental tenet of due process in the criminal context that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *United States* v. *Batchelder*, 442 U.S. 114, 123

(1979). This Court has stated that the failure to provide sufficient clarity of the consequences of violating a given penal statute poses constitutional questions. *Id.* These constitutional protections apply as well to civil penalties for proscribed conduct. *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). An imposition of punishment by the government through a punitive damage award is permissible only if the government provides constitutionally adequate standards to govern the punishment to be received for certain conduct. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring).

Since punitive damages do not serve a compensation function and clearly are penal in nature, the same sort of safeguards should be applied. Several members of this Court have expressed concern about juries' imposition of punishment through an award of punitive damages without some objective standards for determining the proper measure of those damages. As stated by Justice O'Connor:

> Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.
>
> Punitive damages are awarded not to compensate for injury but, rather, "to punish reprehensible conduct and to deter its future occurrence." [citations omitted]. Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, "the impact of these windfall recoveries is unpredictable and potentially substantial." [citations omitted]. . . . [T]he Court should

> scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits.
>
> . . . [The] grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with Due Process.

Bankers Life, 486 U.S. at 87-88 (O'Connor, J., concurring). Similarly, In *Browning-Ferris*, 492 U.S. at ____, 109 S.Ct. at 2923, Justice Brennan, in a concurrence joined by Justice Marshall, stated:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. . . . Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," [citations omitted], I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one stipulated within a range of penalties as to which responsible officials had deliberated and then agreed.

In *Browning-Ferris*, the jury was instructed to consider the character of the defendants, their financial standing and the nature of their acts in determining a punitive damages award. *Id.* Nonetheless, Justice Brennan noted:

> Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.

Id. The instructions in this case provided even less guidance than those in *Browning-Ferris*:

> If you find for the Plaintiff, Nicholas King, and you are further satisfied from the evidence that his injuries were caused by the gross negligence of the defendant Remington Arms Company, Incorporated, you may, in your discretion, award punitive damages against Remington in addition to the damages authorized in instruction number 1. If you award punitive damages, you'll state the amount on verdict form B.

This instruction, in fact, provided *no standards* at all for the jury to use in determining the punitive damages award. The jury was "left largely to [itself] in making this important, and potentially devastating decision." *Browning-Ferris*, 492 U.S. at ____, 109 S.Ct. at 2923 (Brennan, J., concurring.)

Remington was severely punished by a jury acting under instructions so vague as to provide no guidance at all. The absence of standards for determining whether to punish and in what amount violated Remington's right to due process. The jury awarded almost precisely the amount of the punitive damages suggested in King's closing argument. One wonders if King's counsel had requested $500 million whether the jury would have awarded that amount.

The standardless imposition of punitive damages further violated due process because Remington, and other product liability defendants, are threatened with repeated arbitrary awards for the same conduct. *See e.g., Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. 1233 (D.N.J. 1989) (discussing asbestos manufacturers facing multiple awards for single course of conduct and illustrating the interesting dilemma posed by standardless multiple awards in mass tort litigation).[6] In the absence of guidance from this

[6]This decision vacated (on other grounds) *Juzwin* v. *Amtorg* Trading Corp., 705 F.Supp. 1053 (D.N.J. 1989), a previous decision

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Court as to the constitutionally required standards for imposing punitive damages, juries are free in each individual case to impose multi-million dollar punitive damage assessment against the same defendant for the single course of conduct.[7] Guidance from this Court is needed. The Court should grant this Petition and reverse the $6 million punitive damage award.

II. Kentucky Law, as Here Applied, Violates Due Process by Permitting an Award of Punitive Damages Without, at a Minimum, Clear and Convincing Evidence of Gross Negligence.

"Punitive damages are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence'." *Bankers Life*, 486 U.S. at 87 (O'Connor, J., concurring), *quoting Gertz* v. *Robert Welch, Inc.*, 418 at 350. It cannot be doubted that a punitive damage award — particularly one as large as the $6 million awarded in this case — places a stigma upon a defendant. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269, 292 (1983).

In most jurisdictions, as in the present case, this stigmatization is permitted upon a mere preponderance of the

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by the same court which contained a thorough discussion of the constitutional infirmities of multiple punitive damage awards for a single course of conduct.

[7]The threat of repeated arbitrary awards is not idle speculation. During the course of the present litigation, Remington faced similar claims in other jurisdictions. For example, in Illinois one jury arbitrarily awarded $1.6 million in punitive damages based upon an injury arising from use of a Remington Model 1100. This award was reversed on appeal. *Loitz* v. *Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990).

evidence showing of the defendant's conduct.[8] This standard leaves the burden of error equally shared despite the fact that the defendant faces a substantial and potentially devastating punishment if the jury awards damages. As explained by Professor Wheeler:

> Equal sharing of the risk of an erroneous judgment is justified in the typical civil suit for compensatory damages because the effect of an error adverse to the defendant is similar to the effect of an error adverse to the plaintiff. . . . Because there is no sound policy reason that supports favoring plaintiffs or defendants as a class, and because the importance of the parties' interests at stake in suits for compensatory damages is roughly equal, the law is approximately indifferent between the two possible types of error. The preponderance of the evidence test reflects this indifference.
>
> The interests that the parties have at stake in a punitive damages case are not similarly equal. If punitive damages are imposed improperly, or in an excessive amount, the defendant suffers far more than a plaintiff does if the jury incorrectly fails to impose them. The interests at stake are different in two respects. The defendant, unlike the plaintiff, suffers a stigma that may be permanent; and the plaintiff, unlike the defendant, has little or no legitimate personal interest in a correct result.

Wheeler, 69 Va.L.Rev. at 292.

In criminal trials, sharing of the risk of error is accomplished through a requirement of proof of guilt beyond a

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[8]Kentucky has attempted to remedy this defect with the enactment of Ky. Rev. Stat. §411.184, mandating a clear and convincing standard for punitive damages. This statute, which became effective on July 15, 1988, did not help Remington, however, because the state courts ruled that it could have no retroactive effect.

reasonable doubt. The petitioner in *Pacific Mutual Life Ins. Co.* v. *Haslip, cert. granted,* 110 S.Ct. 1780 (1990) argues that the beyond a reasonable doubt standard must apply to punitive damages. Remington respectfully submits that, at a minimum, clear and convincing evidence of gross negligence should be required to decrease the risk of an erroneous imposition of this punishment.

This Court has recognized that the due process requirement of a fundamentally fair proceeding varies according to the circumstances and interests involved in the particular type of action. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). In *Mathews,* this Court adopted a three-part balancing test for determining the fundamental fairness of governmental action:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

In certain types of cases, this Court has held that application of these factors makes clear and convincing evidence of the alleged misconduct constitutionally mandated prior to stigmatizing a party. *Santosky* v. *Kramer,* 455 U.S. 745 (1982); *Addington* v. *Texas,* 441 U.S. 418, 431 (1979). In *Santosky,* the stigma associated with the termination of one's parental rights was cited as requiring a higher standard of proof to reduce the risk of erroneous judgment.

The same concerns apply to a state's imposition of punishment through an award of punitive damages where the avowed purpose of any award is to impose punishment. *Santosky*, 455 U.S. at 764-65. *See also*, Wheeler, 69 Va. L. Rev. at 296-98. Under the interest analysis test of *Mathews*, the increased confidence in the judgment arising from application of a clear and convincing burden of proof is constitutionally mandated. First, the defendant's interest in avoiding erroneous impositions of punitive damages cannot be understated. Apart from the financial deprivation, defendants are stigmatized when their conduct is labelled "reprehensible" and worthy of society's punishment. *See, In re Winship*, 397 U.S. 358 (1970) (recognizing loss of reputation as deserving of constitutional protection). Second, the additional safeguard of a clear and convincing requirement would undoubtedly reduce the risk of erroneous deprivations. This standard would cause jurors to reflect more seriously before imposing punishment. *See, Wheeler*, 69 Va.L.Rev. at 296-298. As importantly, judges will often not submit weak punitive damages cases to the jurors under this standard. Finally, the government's interest in not imposing a clear and convincing standard is slight. *Gertz* v. *Robert Welch, Inc.*, 418 at 349 (states have no substantial interest in securing awards far in excess of any actual injury).

Several states, including Kentucky, have recognized the need for this increased protection afforded by a clear and convincing standard of proof in imposing punitive damages.[9] The recognition by these jurisdictions of the need

[9]Several jurisdictions have imposed a clear and convincing requirement by statute. *See, e.g.*, Ala. Code §6-11-20 (1990); Alaska Stat. §09.17.020 (1990); Ga. Code Ann. §51-12-5.1 (1990); Ind.

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for increased protection against the risk of error further supports this Court's review of the constitutional contours of this question.

The significance of a clear and convincing standard of proof is particularly demonstrated by the present case. The trial judge, in considering Remington's tendered instructions, stated:

> The Court: I tell you what I do think, I think this, that if the statute did apply, you know, what I know about clear and convincing proof, and that measure of proof, and the way that the, this statute reads, it — I would have a hard time submitting the case to the jury if I thought, you know — on punitive damages.
>
> . . .
>
> The Court: . . . . clear and convincing evidence, that's a pretty rough row to hoe, you know.

Despite his doubt about the strength of the evidence, the trial judge permitted the jury to consider punitive damages. Applying the preponderance of the evidence standard, the jury imposed a punishment in the arbitrary and standardless amount of $6 million.

Remington respectfully submits that the Due Process Clause prohibits the imposition of punitive damages and consequential stigma associated with such an award through

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Code Ann. §34-4-34-2 (Burns 1990); Ky. Rev. Stat. Ann. §411.184 (Baldwin 1990); Minn. Stat. Ann. §549.20 (1990); Mont. Code Ann. §27-1-221 (1989); Nev. Rev. Stat. §42.005 (1989); Or. Rev. Stat. §41.315 (1990). Other jurisdictions have imposed the heightened standard by judicial decision. *See, e.g., Acosta* v. *Honda Motor Co.*, 717 F.2d 828 (3rd Cir. 1983) (Virgin Islands); *Linthicum* v. *Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); *Tuttle* v. *Raymond*, 494 A. 2d 1353 (Me. 1985); *Wangen* v. *Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980).

a mere preponderance of the evidence standard. This Court should grant Remington's Petition and hold that, at a minimum, a clear and convincing evidence standard must be applied in punitive damage cases.

III. The Amount of the Award of Punitive Damages in This Case Violated Remington's Due Process Right to be Free of Grossly Excessive, Disproportionate Damages Awards.

In *Browning-Ferris*, Justice Brennan suggested that due process forbids excessive damages in civil cases:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909), or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," *St. Louis, I.M. & S.R. Co.* v. *Williams*, 251 U.S. 63, 66-67 (1919). *See also, Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482, 491 (1915); *Missouri Pacific Railway Co.* v. *Humes*, 115 U.S. 512, 522-23 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

492 U.S. at ____, 109 S.Ct. at 2939 (Brennan, J., concurring). The $6 million punitive damage award in this case was fourteen times the amount of the compensatory award. Remington respectfully submits that this disproportionality is a violation of due process.

Punitive damages are not compensation for actual loss. They are intended as punishment. The Due Process Clause,

like the Equal Protection Clause and the Eighth Amendment, requires that punishment be proportionate to the severity of the offense. *Solem* v. *Helm*, 463 U.S. 277 (1983); *Plyler* v. *Doe*, 457 U.S. 202 (1982); *Trop* v. *Dulles*, 356 U.S. 86 (1958); *Gregg* v. *Georgia*, 428 U.S. 153 (1976). The excessiveness of the award in this case, and the number of other multi-million dollar awards being rendered in the United States, shows the necessity for this Court to make a broad review of punitive damages doctrine on due process grounds, and require that they bear a necessary relationship to the actual harm caused.

CONCLUSION

For the foregoing reasons, Petitioner, Remington Arms Company, Inc., respectfully requests this Court to grant its Petition for Certiorari and vacate the award of punitive damages in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

RENDERED: MARCH 30, 1990; 10:00 A.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 89-CA-340-MR

REMINGTON ARMS COMPANY, INC. - - - *Appellant*

v.

NICHOLAS N. KING - - - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Hon. Edwin A. Schroering, Jr., Judge
Civil Action No. 83-CI-8045

AFFIRMING

BEFORE: GUDGEL, STUMBO, and WEST, Judges.

WEST, JUDGE. This is an appeal from a judgment based on a jury verdict which awarded $417,926.47 in compensatory damages and $6,000,000.00 in punitive damages to the appellee. Mr. King, a competitive skeet shooter, suffered severe injury to his left hand and arm when a Remington 1100 12 gauge shotgun which he was firing exploded. The key issue at trial was whether this accident occurred due to defective design of the shotgun barrel or because of an improperly overloaded cartridge.

On appeal, Remington does not claim that there was insufficient evidence to support the jury verdict. Neither does it argue that the verdict is so excessive as to appear

to have been given under the influence of passion or prejudice. CR 59.01(d); *Davis* v. *Graviss*, Ky., 672 S.W.2d 928 (1984). Instead, the contentions on appeal, in regard to the amount of the verdict, are that the punitive damages instructions should have been based upon KRS 411.184 and that the award violates the Eighth Amendment prohibition against excessive fines.

Mr. King sustained his injuries in 1982. In 1983, this action was filed seeking compensatory and punitive damages. In the 1988 session, the General Assembly enacted House Bill 551 which has been codified as KRS 411.182 - KRS 411.188. These statutes, among other things, modify the law on punitive damages. KRS 411.184(2) requires clear and convincing evidence that the defendant acted toward the plaintiff with oppression, fraud or malice as a predicate to awarding punitive damages and KRS 411.186 sets out specific criteria to be considered in assessing the amount of punitive damages.

Remington argues that KRS 411.184 became effective on July 15, 1988, and is applicable to *all* cases tried after that date. This trial commenced on December 6, 1988. We believe this issue has been resolved by recent opinions of the Supreme Court and the trial court did not err in refusing to apply these statutes retroactively. *See, e.g., Sweasy* v. *King's Daughters Memorial Hospital*, Ky., 771 S.W.2d 812 (1989); *Koching* v. *International Armament Corp.*, Ky., 772 S.W.2d 634 (1989). In both of these cases, the Supreme Court found that application of a provision of this same house bill in a case where the event occurred prior to its enactment constituted impermissible retroactive application. *See, also, Floyd* v. *Carlisle Const. Co., Inc.*, Ky., 758 S.W.2d 430 (1988); *Conley* v. *Amer. Motors Corp.*, Ky. App., 769 S.W.2d 75 (1989). In light of these recent rulings on the issue, we find it unnecessary to further discuss the retroactivity argument.

Following this trial and the resulting large verdict, Remington sought a judgment NOV and/or new trial on the grounds that this $6 million dollar punitive damages award violated the constitutional prohibition against excessive fines. Without belaboring this point, we simply hold that the recent opinion of the United States Supreme Court in *Browning-Ferris Ind. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. ____, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), is dispositive of this issue. Therein, it was held that the excessive fines clause of the Eighth Amendment does not apply to punitive damage awards in cases between private parties. *Id.* at 2921. Appellant now contends that this decision was an "obvious invitation for a due process challenge" based upon the arbitrary lack of standards for punitive damages. Even if this were so, the issue was not raised in the trial court and we cannot *sua sponte* address issues which were never raised, no matter how challenging. Moreover, as our country's highest court noted in *Browning-Ferris, supra*, when performing the limited function of an appellate court, considerable deference must be accorded to the trial court's decision not to order a new trial. *Id.* at 2921-2922.

Finally, Remington argues that the plaintiff's counsel's reference to the shotgun's alleged financial profitability was prejudicial and an improper reference to the financial condition of a party. It appears from the verdict that the suggestions made by plaintiff's counsel in closing argument were indeed followed by the jury in determining the punitive damages award. This contention, therefore, causes us some concern but cannot serve as grounds for reversal.

It is true that Kentucky, through case law, has held that the financial condition of a defendant is not admissible in an action for punitive damages. *Hensley* v. *Paul Miller Ford, Inc.*, Ky., 508 S.W. 2d 759 (1974). Other jurisdictions have held that the defendant's financial worth is ad-

missible and relevant to the amount of a punitive damages award, which is meant to deter defendants from repeating misconduct as well as punish past behavior. *See, e.g., Ainsworth* v. *Combined Ins. Co. of America*, Nev., 763 P.2d 673 (1988); *Tolliver* v. *Mathas*, Ind. App., 538 N.E.2d 971 (1989); *Birchfield* v. *Texarkana Mem. Hospital d/b/a Wadley Hospital*, Tex., 747 S.W.2d 361 (1987). Some states require a prima facie showing of "entitlement" to punitive damages before evidence regarding net worth may be introduced. *Curtis* v. *Partain*, 272 Ark. 400, 614 S.W. 2d 671 (1981); *Campen* v. *Stone*, Wyo., 635 P.2d 1121, 1132 (1981); see also *Annot.*, 32 A.L.R. 4th 432 (1984). It would appear, from reading KRS 411.186, that our legislature has also concluded that such evidence of the "profitability of the misconduct" should be provided to the jury to assist it in assessing the *amount* of punitives, once it has been determined that punitive damages should be awarded. KRS 411.186(2)(c). However, as we have previously noted, KRS 411.186, also a section of House Bill 551 enacted by the 1988 General Assembly, is not applicable to this action.

Thus, *Hensley, supra*, stands as the most recent authority on the issue in this Commonwealth and would prohibit any showing of the respective financial conditions of the parties. *Id.* at 764. Nonetheless, we cannot reverse the judgment herein, as appellant did not preserve this error.

The profitability comparison made by plaintiff's counsel in closing argument was based upon facts before the jury regarding the cost of the Model 1100 and the total amount of gross sales, as well as the cost to remedy the alleged defect.

Remington's counsel did not object to plaintiff's counsel's "suggested method" of assessing punitives, except to state that one $500.00 estimated value of the shotgun was outside the evidence. That objection was properly over-

ruled because the letter containing that estimate had been introduced and there was no further complaint made. Attorneys should be granted latitude in making their arguments to the jury and drawing reasonable deductions from the facts adduced at trial. *Urban* v. *Walker,* Ky., 403 S.W.2d 11 (1966). Although the references herein may have exceeded the prohibition set forth in *Hensley, supra,* where there was no objection on that basis, we will not find it grounds for reversal.

The remaining issues on appeal relate to discovery and evidentiary rulings of the trial judge. At the outset of the trial, counsel for the plaintiff, in his opening statement, utilized posters to outline the facts expected to be proven at trial. Included on one of the posters was a statement that "only 12 gauge Model 1100's explode." Appellant now contends that the display of this poster, specifically the above statement, to the jury throughout the trial was inflammatory and prejudicial. It is further asserted that there was in fact no evidence to support that statement and that Remington was not permitted to establish its falsity. We have reviewed at great length the numerous tapes of this nine (9) day trial. Having done so, we cannot agree that the statement on this demonstrative aid, even if false, caused such prejudice as to warrant reversal.

Counsel is given wide latitude in directing the attention of the jury to all facts he in good faith believes will be established at trial. *Hollis* v. *Fisk,* Ky., 242 S.W.2d 1012 (1951). Even if the evidence is not thereafter produced, the conduct, though improper, does not necessarily lead to reversible error. *Id.; Bruner* v. *Gordon,* 309 Ky. 29, 214 S.W.2d 997 (1948). If the unproved evidence is considered prejudicial, the appropriate procedural remedy is a motion for a mistrial. *Williams* v. *Commonwealth,* Ky., 602 S.W.2d 148 at 149 (1980). No request was made for a mistrial at the close of plaintiff's case. Remington's only

objection at the conclusion of the proof was that there had been no testimony to the effect that "only Model 1100 12 gauge guns explode." Accordingly, the error, if any, is not preserved.

Appellant also maintains that it was denied the right to show that shotguns of other manufacturers also explode. Having reviewed the record, we do not agree that the court improperly restricted Remington's proof on this issue. One of Remington's witnesses was permitted to state before the jury that his company had received complaints of explosions involving models other than the Remington 1100. The court limited any further exploration into this area because the witness lacked the qualifications and personal knowledge to support that testimony. It is also apparent that Remington had previously sought to restrict this line of testimony when the plaintiff attempted to raise it and the court agreed. The trial court did not abuse its discretion, but merely exercised reasonable caution in its rulings which limited the amount of irrelevant and misleading information put before the jury.

Likewise, we find that the court below acted cautiously and within its discretion in permitting the introduction of prior similar occurrences. Remington argues that the evidence of other explosions was inflammatory and that the trial judge improperly permitted proof of other mere complaints. The language of *Montgomery Elevator Co.* v. *McCullough*, Ky., 676 S.W.2d 776 (1984), is squarely on point in this case. Evidence of similar product failures under similar conditions is clearly relevant and admissible in a products liability design defect case such as this. *Id.* at 783. The requirement of substantial similarity between the earlier accidents and the one at issue is a matter of relevance to be decided by the trial judge and will not be easily reversed. *Id.;* Lawson's, *Kentucky Evidence Law Handbook*, Second edition, §2.25 (1989 Supplement). Here,

the court carefully considered this issue prior to trial and set strict guidelines to insure that only substantially similar prior incidents would be admitted.

The existence of other similar complaints of explosions was revealed to King in Remington's responses to requests for admissions and interrogatories. If there was any error in that any of those complaints were not first shown to be substantially similar, it was both harmless and waived. *McCullough, supra*, at 784.

Appellant alleges two (2) violations of the civil rules pertaining to pretrial discovery. First, Remington objected to a statement by one of the plaintiff's experts, Dr. Ripling, on grounds that it was an opinion which should have been disclosed in interrogatories pursuant to CR 26.02. This contention is totally without merit. Dr. Ripling was deposed for three (3) days prior to trial and the plaintiff unquestionably provided defendant with the "substance of the facts and opinions to which the expert is expected to testify." CR 26.02(3)(a). We hold there was adequate disclosure and find no evidence of unfair surprise or "trial by ambush" as suggested by appellant. The intent of the rule, to enable counsel to prepare for cross-examination has been satisfied. *Newsome by and through Newsome* v. *Lowe*, Ky. App., 699 S.W.2d 748, 751 (1985).

Finally, appellant maintains that the trial court erred in refusing it discovery of Edward Crossman's findings, opinions and conclusions in this case. Plaintiff consulted Crossman, a firearms expert, prior to filing suit and in anticipation of litigation. He was utilized as a consulting expert, not expected to testify at trial and was never revealed by the plaintiff to the defendant as an expert for the plaintiff. When his identity was somehow discovered by appellant, it sought to take the discovery deposition of Crossman.

The appellee moved for a protective order relying upon *Newsome by and through Newsome* v. *Lowe*, Ky. App., 699 S.W. 2d 748 (1985), cited herein on another issue. The trial court conducted a hearing and held that Remington could not depose Crossman as the impressions, conclusions, or opinions of pre-litigation consultants are privileged. *Id.* at 751-752. We agree because Remington failed to make any showing of substantial need or exceptional circumstances. CR 26.02(3)(a). Now, Remington argues that it should have been permitted to call Crossman as a witness at trial in order to show that he was originally consulted by the plaintiff.

Although it does not appear that appellant even attempted to call Dr. Crossman as a witness, we note that the parties have no absolute right to know the existence of pre-litigation consultants who are not retained as experts for trial. Indeed, the purpose for restricting discovery of this type of material is to protect the confidentiality and encourage the use of such consultations in order to reduce the number of frivolous lawsuits. *Newsome*, *supra*, at 752. This form of evidence could be both prejudicial and irrelevant to the issues of the case and its admissibility is best left to the discretion of the trial judge. In its exercise of that discretion on this matter as well as the various other issues raised herein, we find no abuse.

In conclusion, the size of the verdict alone cannot be relied upon as evidence that defendant did not receive a fair trial when our review of the record indicates otherwise. As appellant has presented no argument before this Court which would warrant reversal, the judgment is affirmed.

ALL CONCUR.

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APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 89-CA-340-MR

REMINGTON ARMS COMPANY, INC. - - - *Appellant*

v.

NICHOLAS N. KING - - - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Hon. Edwin A. Schroering, Jr., Judge
Civil Action No. 83-CI-8045

ORDER

BEFORE: GUDGEL, STUMBO, and WEST, Judges.

GUDGEL, JUDGE: This matter is before the Court on appellant's petition for rehearing, appellant's motion to add additional counsel and appellee's motion to strike appellant's petition and to dismiss the appeal. This Court, having considered the petition and motions, ORDERS as follows:

1. Appellant's petition for rehearing is DENIED.

2. Appellant's motion to add Edgar A. Zingman, Sheryl G. Snyder and Wyatt, Tarrant & Combs as additional counsel is GRANTED.

3. Appellee's motion to strike and to dismiss is DENIED. However, appellee's motion was considered by this Court as a response to the petition.

Entered: June 15, 1990

(s) Paul D. Gudgel
Judge, Court of Appeals

APPENDIX C

SUPREME COURT OF KENTUCKY

90-SC-526-D
(89-CA-340-MR)

REMINGTON ARMS COMPANY, INC. - - - *Movant*

v.

NICHOLAS N. KING - - - - - - - *Respondent*

Jefferson Circuit Court
83-CI-8045

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Leibson, J., not sitting.

ENTERED November 20, 1990.

(s) Robert F. Stephens
Chief Justice

APPENDIX D

SUPREME COURT OF KENTUCKY

90-SC-526-D

REMINGTON ARMS COMPANY, INC. - - - *Movant*

v.

NICHOLAS N. KING - - - - - - - *Respondent*

On Review from Court of Appeals
89-CA-000340
Jefferson Circuit Court No. 83-CI-008045

ORDER

Respondent's motion for a stay pending the filing of a petition for writ of certiorari with the United States Supreme Court is denied.

Stephens, C.J., and Combs, Gant, and Lambert, JJ., sitting. All concur.

ENTERED December 20, 1990.

(s) Robert F. Stephens
Chief Justice